SUPREME COURT, U. S.

DEC 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-789

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, ET AL.,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, DRY COLOR MANUFACTURERS' ASSOCIATION, INC., AMERICAN DYE MANUFACTURERS INSTITUTE, INC., AMERICAN CYANAMID COMPANY, INMONT CORPORATION, UNION CARBIDE CORPORATION, CELANESE CORPORATION, ALLIED CHEMICAL CORPORATION, DOW CHEMICAL U.S.A., AEROJET-GENERAL CORPORATION, PFISTER CHEMICAL, INC., AND CROMPTON & KNOWLES CORPORATION,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY, DEPARTMENT OF LABOR, AND JOHN H. STENDER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners ask that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 26, 1974.

OPINION BELOW

The opinion below is reported at 503 F.2d 1155 and is annexed hereto as Appendix A, pp. 1-11.

JURISDICTION

The judgment of the court of appeals here sought to be reviewed was entered on August 26, 1974. A petition for rehearing was denied on September 25, 1974. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 6(f) of the Occupational Safety and Health Act of 1970 ("the Act") (29 U.S.C. § 655(f)) provides that occupational safety and health standards promulgated by the Secretary of Labor "shall be conclusive if supported by substantial evidence in the record considered as a whole."

The questions presented on this petition are as follows:

1. Whether the "substantial evidence" test should govern review of all determinations by the Secretary?

2. Whether there is a category of administrative determinations denominated "policy" involved in the formulation and promulgation of a particular standard to which the substantial evidence test is not applicable?

3. Whether the substantial evidence test requires the reviewing court to determine if there is evidence to support the standard in terms of the criterion adopted by OSHA for issuing the standard?

By the foregoing, Petitioners make no attempt to seek review in this Court of the substantiality of the evidence to support the occupational safety and health

standard, since that is properly the function of the court below. Rather, it is Petitioners' intent that this Court should determine what standard courts of appeals should apply in reviewing the determinations of the Secretary.

STATUTES AND REGULATIONS INVOLVED

1. *Occupational Safety and Health Act of 1970.* Section 6 is set forth in Appendix B, pp. 12-20.

2. *Occupational Safety and Health Standards.* The Assistant Secretary of Labor for Occupational Safety and Health has issued standards which regulate exposure of employees to fourteen specified chemicals said to be carcinogenic, including a standard for ethyleneimine. The standard for ethyleneimine (29 C.F.R. § 1910.93*l*) which petitioners seek to have reviewed in this action is set forth in Appendix C, pp. 21-49.

STATEMENT OF THE CASE

This petition seeks review of the decision of the court of appeals that the "substantial evidence" standard of review mandated by Section 6(f) of the Act does not apply to "policy" issues, even though said issues may be factual in nature, and does not require the Secretary to justify his standards on the basis of the announced criterion for establishing them.

The Occupational Safety and Health Act is a comprehensive piece of legislation with far-reaching impact on the Nation's economy, on people's jobs and on safety in the workplace. The Secretary of Labor's responsibilities in setting occupational safety and health standards are the cornerstone of this legislation, and as such proper promulgation of these stand-

ards and subsequent careful judicial review, are of vital importance to the Nation.[1]

The Assistant Secretary of Labor for Occupational Safety and Health ("OSHA") in an Order published January 29, 1974 (39 Fed. Reg. 3756; see App. C, 21-49), promulgated certain "permanent" occupational safety and health standards under Section 6(b) of the Act (29 U.S.C. § 655(b)). Petitioners filed a Petition for Review of these standards in the United States Court of Appeals for the Third Circuit pursuant to Section 6(f) of the Act (29 U.S.C. § 655(f)) which provides that any person adversely affected by standards issued under that section may file a petition challenging their validity with an appropriate court of appeals. The standard for ethyleneimine ("EI") (29 C.F.R. § 1910.93*l*) was among the standards as to which petitioners sought review. By order dated April 12, 1974, the court below stayed the EI standard pending determination of its validity and established a separate, expedited schedule for briefing and argument concerning EI.

EI is a valuable intermediate chemical, used as a building block for numerous end-product chemicals widely used in manufacturing drugs and in research, including important cancer studies. As a result of careful handling and stringent safety precautions, EI has an excellent health and safety record over 35 years of use.

The court below rendered an opinion, entered August 26, 1974, remanding a minor provision of the EI standard relating to laboratories to OSHA and otherwise upholding the standard. In reaching this deci-

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[1] The Department of Labor has begun only a small portion of its work of setting occupational safety and health standards. The Department has plans to issue standards for almost 400 chemicals in the next two years. See note 25, p. 26, *infra*.

sion, the court held the substantial evidence test not to be applicable to the key determination by OSHA that EI is a human carcinogen and instead adopted a much narrower scope of review. The court also failed to determine whether there was substantial evidence to support the EI standard in terms of the criterion adopted by OSHA for issuing it.[2]

1. Prior Proceedings

The permanent standard promulgated by OSHA for EI (29 C.F.R. § 1910.93*l*) stemmed from an "emergency temporary standard" issued by OSHA on May 3, 1973 (38 Fed. Reg. 10929).[2a] On October 4, 1973, the United States Court of Appeals for the Third Circuit vacated the emergency temporary standard for EI which was similar to the permanent standard. *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98 (3d Cir. 1973). Since the

[2] The Third Circuit has just handed down its decision as to the other 13 chemicals in the Petition for Review, and followed its holding in the instant case in doing so. *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, No. 74-1129 (3d Cir. Dec. 17, 1974) (see note 22, p. 24, *infra*).

[2a] The Act provides procedures for issuance of three different types of occupational safety and health standards: (1) national consensus or established Federal standards (Section 6(a)), (2) permanent standards (Section 6(b)), and (3) emergency temporary standards (Section 6(c)). The interim, national-consensus standards-setting authority expired April 28, 1973. Permanent standards are set under the regular rulemaking provisions of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*, hereinafter "APA"). Emergency temporary standards, on the other hand, are effective immediately upon publication in the *Federal Register*. The hearing, public comment, and other provisions of the APA do not apply. To use this emergency procedure, the Secretary of Labor (or his delegate, in this case the Assistant Secretary of Labor for Occupational Safety and Health) must make specified factual findings. He must also begin a permanent rulemaking process and complete that process within six months after publication of the emergency temporary standard (Section 6(c)(3)).

emergency standard served as a proposed rule for the permanent standard for EI, the events surrounding the promulgation and invalidation of the emergency temporary standard are briefly described.

OSHA began examining the prospective regulation of suspected occupational carcinogens as early as the first part of 1972.[3] On May 23, 1972, OSHA wrote to the National Institute of Occupational Safety and Health ("NIOSH") requesting "all available information of known carcinogens used in industry"—noting specifically nine chemicals but not mentioning EI—and requesting "your recommendations for handling these substances with regard to writing standards."

NIOSH, an agency in the Department of Health, Education and Welfare, created by the Act to provide scientific assistance to OSHA, did not respond that any emergency existed. Rather, it published in the *Federal Register* for July 6, 1972 (37 Fed. Reg. 13286), a notice that it wished to develop "criteria documents" (a normal step in the formulation of permanent standards) on fifteen chemicals, including EI, that NIOSH believed were "known or suspected carcinogenic substances," and that it would welcome information on these substances within the following ninety days.

On December 29, 1972, the Health Research Group and the Oil, Chemical and Atomic Workers International Union ("HRG-OCAW") petitioned OSHA to issue an emergency temporary standard banning, for all practical purposes, ten of the fifteen chemicals

[3] The background of the promulgation of the EI standard was reviewed by OSHA in the preamble to the permanent standard, at 39 Fed. Reg. 3756 (Jan. 29, 1974) (see App. C, 21-23).

covered by NIOSH's July 6, 1972, notice in the *Federal Register*. The HRG-OCAW petition did not mention EI. On February 9, 1973, OSHA published in the *Federal Register* notice of the filing of the HRG-OCAW petition, along with the standard proposed in their petition, and invited public comment by March 11, 1973, on the petition and on the ten chemicals named in it (38 Fed. Reg. 4037).

On April 17, 1973, HRG-OCAW brought a well-publicized suit to compel OSHA to issue an emergency temporary standard. *Oil, Chemical & Atomic Workers International Union* v. *Brennan*, Civil Action No. 730-73 (D.D.C., filed April 17, 1973). Shortly thereafter, OSHA did issue an emergency standard, dated April 26, 1973, and published May 3, 1973, at 38 Fed. Reg. 10929. The OSHA emergency standard covered fourteen chemicals, including four chemicals, among them EI, which were not mentioned in the HRG-OCAW petition.

Thereafter, Petitions for Review of the emergency temporary standard were filed in the United States Court of Appeals for the Third Circuit by interested chemical industry trade associations and a number of individual chemical companies, and by HRG-OCAW. In *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98 (3d Cir. 1973), the Third Circuit vacated the emergency temporary standard as to EI and as to 3,3'-dichlorobenzidine ("DCB") and remanded the proceedings to OSHA. The court held that the statement of reasons and findings of fact proffered by OSHA to support the emergency temporary standard were inadequate, and that it was adopting the remedy of vacating the standard "[i]n view of our considerable doubts as to whether

there is sufficient evidence in the record to support the finding that DCB and EI are carcinogenic in man . . ." (486 F.2d at 107 n.13).

Section 6(c)(3) of the Act (29 U.S.C. § 655(c)(3)) requires OSHA to adopt a permanent standard within six months of issuance of an emergency temporary standard and provides that the temporary standard as published shall serve as a proposed rule for the rulemaking proceeding. Before the decision in *Dry Color* was rendered on October 4, 1973, OSHA thus had begun to take the procedural steps required to arrive at a permanent standard. The rulemaking proceeding involved the invitation of written comments and the holding of public hearings commencing September 11, 1973.

On November 29, 1973, by which date permanent standards had not yet issued, HRG-OCAW again brought an action for a declaratory judgment and mandatory injunction against OSHA, alleging that it had wrongfully failed to issue a permanent standard or, alternatively, to revoke a standard, within six months as required by Section 6(c)(3) of the Act. *Oil, Chemical & Atomic Workers International Union* v. *Brennan*, Civil Action No. 2127-73 (D.D.C., filed November 29, 1973). HRG-OCAW thereafter filed a motion for summary judgment, which was set for hearing on January 29, 1973. On that date, permanent standards very similar to the emergency temporary standard were published in the *Federal Register* for fourteen different chemicals, including EI, and the lawsuit was no longer prosecuted.

After OSHA issued these permanent standards, petitioners filed their Petition for Review in the court

of appeals. As stated above, the EI portion of the petition was considered separately in the court of appeals.

2. The Principal Issues Below

In its Preamble to the EI permanent standard OSHA stated that the case for the carcinogenicity of EI "rests on the extrapolation to humans of the findings in two separate controlled animal studies" and stated that it was adopting the NIOSH criterion that "prior demonstration of carcinogenicity in at least two animal studies"[4] was the basis for making such an extrapolation. (App. C, 25.) Petitioners' basic challenge to the validity of the EI standard in the court below was that OSHA's determination that EI is a human carcinogen is not "supported by substantial evidence in the record considered as a whole" as required by Section 6(f) of the Act.

In the first of the two animal studies to which OSHA referred in the Preamble, Walpole and others in 1954 found that rats injected with EI developed injection site sarcomas which they attributed to the action of EI.[5] Petitioners pointed out with respect to this study that subsequent experimental work, done in the mid-1960s, showed that sarcomas could be produced by repeated injections of highly toxic (but noncarcino-

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[4] Although the Preamble refers to the NIOSH criterion as requiring "prior demonstration of carcinogenicity in at least two animal *studies*," the actual NIOSH criterion requires demonstration of carcinogenicity in two animal *species*. *See* pp. 21-22, *infra*.

[5] Walpole, Roberts, Rose, Hendry & Homer, *Cytotoxic Agents: IV, The Carcinogenic Actions of Some Monofunctional Ethyleneimine Derivatives*, 9 BRIT. J. PHARMACOL. 306 (1954).

genic) substances.[6] EI is a very toxic substance; it is a severe blistering agent and has a low lethal dose. Petitioners therefore contended that the malignant tumors produced in the Walpole test were due to the simple, physical toxic action of the substance repeatedly killing the tissue near the injection site, a situation not representative of any possible occupational exposure.

In the other test, by the Innes group, a portion of a group of mice fed EI developed tumors, but no definite carcinomas were produced.[7] With regard to this study, the Third Circuit in *Dry Color* observed:

> Innes is unclear as to whether the tumors produced in mice were malignant and specifically cautions against extrapolating from this data as to the carcinogenic effect in rodents to that in man. (486 F.2d at 103.)

Petitioners thus argued below that even if all factual issues had been resolved by OSHA against petitioners, the test results reported by Walpole and Innes did not constitute "a prior demonstration of carcinogenicity in at least two animal studies," the criterion OSHA purported to apply in the case of EI. Petitioners also pointed out that OSHA had been supplied in the rulemaking proceeding with scientific evidence that EI was not a carcinogen for man. After a detailed study of the human epidemiological experience with EI, two physicians at the University of California Medical Center in San Francisco detected no change in mortality or morbidity or any changes in the frequency or

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[6] Munn, *Extrapolation of Experimental Carcinogenicity to the Reality of Industrial Exposure*, 15 ANN. OCCUP. HYG. 75 (1972).

[7] Innes, *et al.*, *Bioassay of Pesticides and Industrial Chemicals for Tumorogenicity in Mice: A Preliminary Note*, 42 J. NAT'L CANCER INST. 1101 (1969).

type of malignancies occurring among workers utilizing this material over a number of decades.[8] Doctor Hine, one of the authors of this study, concluded that based on all medical and experimental data, including the Innes and Walpole studies, it would be scientifically inaccurate to classify EI as a carcinogen.

Respondents' counsel admitted that OSHA had inadvertently *ignored* this study of the actual human experience with EI in promulgating the EI standard,[9] but argued in the court of appeals that EI had been shown to be capable of causing tumors in rats and mice and that this was substantial evidence that it was a cancer hazard for man, citing for this proposition the Report to the Surgeon General of the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens.[10] Petitioners pointed out, however, that the approach taken by the Ad Hoc Committee had been rejected by the Chemicals and Health Panel of the President's Science Advisory Committee[11] and that the Preamble to the standards clearly

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[8] Milby & Hine, *A Study of Morbidity and Mortality of Employees Exposed to Ethyleneimine*, prepublication edition (September, 1973).

[9] Brief of Respondents at 35-36, *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, 503 F.2d 1155 (3d Cir. 1974).

[10] Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens, EVALUATION OF ENVIRONMENTAL CARCINOGENS—REPORT TO THE SURGEON GENERAL (1970) (hereinafter "Ad Hoc Committee Report").

[11] CHEMICALS & HEALTH, REPORT OF THE PANEL ON CHEMICALS AND HEALTH OF THE PRESIDENT'S SCIENCE ADVISORY COMMITTEE (1973). The Panel's advisors included the Surgeon General, the Commissioner of the Food & Drug Administration, the President of the National Academy of Sciences, and top-ranking officials of the Council on Environmental Quality, the Environmental Protection Agency and the Department of Commerce.

states that, as to EI, OSHA adopted the NIOSH view that *carcinogenicity,* not *tumorogenicity,* in two animal species must be demonstrated before one could extrapolate to carcinogenicity in man, assuming that no better evidence than animal experiments were available. Petitioners objected further that even if OSHA's criterion were satisfied, there was countervailing evidence in the record, including evidence of favorable human experience which OSHA acknowledged it had ignored, and that on balance there was not substantial evidence in the record as a whole to sustain OSHA's factual finding that EI is carcinogenic to man.

3. The Decision Below

Before addressing itself to the factual issues raised and briefed by both sides, the court of appeals turned to a consideration of the appropriate scope of review. The court noted that Section 6(b) of the Act states that standards may be adopted by informal rulemaking analogous to that provided for in Section 4 of the Administrative Procedure Act ("APA") (5 U.S.C. § 553). However, Section 6(f) of the Act provides that the scope of judicial review shall be the "substantial evidence" test which usually applies to adjudicatory determinations, rather than the narrower "arbitrary or capricious" test which ordinarily applies to determinations not made on the basis of a formal record.

While admitting that "[i]t is clear that application of the substantial evidence test to informal rulemaking was a deliberate legislative compromise between the House and Senate versions of the bill which became law" (App. A, 5-6; 503 F.2d at 1158), the court below

nevertheless ruled that a narrower standard of review was appropriate for what it called "legislative policy decisions" by the Secretary. The court apparently was of the view that with respect to such "policy" decisions, it is sufficient for OSHA merely to demonstrate that it has considered the "factors relevant under the statute" and "presently available alternatives" before reaching a decision (App. A, 10; 503 F.2d at 1160). Thus it is not necessary that substantial evidence, or indeed any evidence, be adduced to support such a decision and countervailing evidence may be ignored.

The court then went on to find that in extrapolating from animal studies to humans, OSHA had made such a policy judgment. Without any discussion whether there was evidence to show that OSHA had applied its stated criterion of carcinogenicity in two animal species, the court simply concluded:

> Lastly, we hold that there does exist substantial evidence in the record as a whole to support the Secretary's finding that EI is carcinogenic in rats and mice and in the absence of evidence of carcinogenicity in humans, the Secretary properly weighed the only available alternatives. We, therefore, reject the petitioners' challenge to the EI standards except in so far as they relate to laboratories as outlined above. (App. A, 11; 503 F.2d at 1160-61.) [12]

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[12] The court below vacated the laboratory standard for lack of notice: "We note that there was a lack of notice regarding OSHA's plans to make special provisions regarding EI's use in research laboratories. The Secretary's notice did not advise that the agency planned to make special provisions regarding EI use in laboratories. Because of this, we hold that to the extent that the standards in question relate to research laboratories, they will be vacated and remanded to OSHA." (App. A, 10-11; 503 F.2d at 1160.)

THE REASONS FOR GRANTING THE WRIT

1. The Court Below Has Severely Narrowed the Scope of Judicial Review of OSHA Standards, Thereby Raising an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Section 6(f) of the Act provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." The statute thus provides for a single standard for review of OSHA determinations under Section 6 of the Act. Without any justification in the legislative history or the language of the Act, the court below has created a new category of administrative determinations which it called "legislative policy determinations" (App. A, 7; 503 F.2d at 1158), and subjected them to a different standard of review —one approaching total deference to administrative decision making.

A major deficiency of the opinion below is that it nowhere defines the term "legislative policy decisions." It thus creates the dangerous possibility that by casting standards in the form of factually unsupported "policy" determinations, OSHA can make an easy "end run" around the substantial evidence requirement of Section 6(f).

The decision below ignores the careful legislative balancing involved in granting OSHA, a new governmental entity, broad powers to issue regulations affecting most employers in the United States but requiring that its decision be supported by a factual record which the courts could review. By holding that "policy decisions" do not have to be supported by such a record, the court has unduly limited the scope of review of OSHA standards. Its decision on this important issue clearly merits review in this Court.

The approach of the court below contrasts sharply with that of a different panel of the same court in *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98 (3d Cir. 1973), involving an emergency temporary standard for the same chemical. The court there stated that the Secretary's decisions must be supported by substantial evidence (*id.* at 102) and that it doubted whether there was substantial evidence to support the EI standard. The decision of the court below is also inconsistent with the decision of every other circuit court that has considered this issue. As is discussed in Point 2, *infra*, those courts hold that the legislative history compels the conclusion that Congress intended that all of OSHA's determinations should, when challenged, be subject to rigorous judicial review. To effectuate that purpose, Congress provided that OSHA decisions must be supported by substantial evidence.

a. The legislative history establishes that the substantial evidence test is to apply to all OSHA determinations.

OSHA is authorized to promulgate mandatory occupational safety and health standards "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (Section 2(b) of the Act, 29 U.S.C. § 651). It can directly assess civil penalties on any person who fails to comply with such standards (Sections 17(a)—(d), (i), 29 U.S.C §§ 666(a)—(d), (h)) and willful violations are also subject to criminal sanctions (Sections 17(e)—(g), 29 U.S.C. §§ 666(e)—(g)). Recognizing that it was granting wide-ranging powers to the Department of Labor, Congress tried to insure that there were sufficient checks against abuse of those powers. Congress therefore departed from the

standard wording of the substantial evidence test contained in one section of this Act,[13] and in other acts,[14] which limits application of the substantial evidence test to factual determinations, and provided in Section 6(f), which deals solely with review of OSHA standards by courts of appeals, that judicial review is *not* limited to questions of fact, but rather is to be applied to the "determinations of the Secretary," without exception.

As the court below recognized, Congress made a deliberate choice to subject OSHA's standard-setting determinations to the "substantial evidence" standard of review, rather than the narrow "arbitrary or capricious" test contained in Section 10(e) of the APA (5 U.S.C. § 706(2)(E)).[15] The original Senate

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[13] Section 11(a) (29 U.S.C. § 660(a)).

[14] *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135b(d); Natural Gas Act, 15 U.S.C. § 717r(b).

[15] On two other occasions Congress has opted for the substantial evidence test for informal rulemaking proceedings, in order to circumscribe any abuse of power by an agency that has been given wide-ranging administrative powers. The Consumer Product Safety Act (15 U.S.C. § 2051 *et seq.*) imposes the identical standard of review in Section 11(e) (15 U.S.C. § 2060(e): "The consumer product safety rule shall not be affirmed unless the Commission's findings under Section 9(c) [15 U.S.C. § 2058(c)] are supported by substantial evidence on the record taken as a whole." Judge Friendly noted in *Associated Industries of New York State, Inc.* v. *Department of Labor*, 487 F.2d 342 (2d Cir. 1973), that the review provided by Section 11(e) of the Consumer Product Safety Act was to be of decisions "intensely legislative in kind," and that the substantial evidence test was to be applied to those legislative decisions. *Id.* at 347 & n.4. The Federal Environmental Pesticide Control Act of 1972 (7 U.S.C. § 136 *et seq.*) requires that *orders* be based on substantial evidence (7 U.S.C. § 136(b)). The court in *Environmental Defense Fund, Inc.* v. *EPA*, 489 F.2d 1247, 1251-52 (D.C. Cir. 1974), had no difficulty in applying this standard of review to an EPA order effectively prohibiting the use of DDT.

bill provided that the OSHA standards would be promulgated through informal rulemaking subject to the arbitrary or capricious test while the House bill required that there be formal rulemaking and "substantial evidence in the record considered as a whole" to support the Secretary's determinations. In reaching a compromise in the conference committee, the Senate bill's standard of review was rejected, in favor of the House version. This was not a casual compromise. After reviewing the legislative history of the Act in *Associated Industries of New York State, Inc.* v. *Department of Labor,* 487 F.2d 342, 349 (2d Cir. 1973), Judge Friendly, speaking for the court, concluded that the substantial evidence test was adopted in Section 6(f) as a tradeoff for the House's abandoning its insistence on formal rulemaking on the record (which would automatically have been subject to substantial evidence review under APA Section 10(e)). See also *Florida Peach Growers Association, Inc.* v. *Department of Labor,* 489 F.2d 120 (5th Cir. 1974).

The House in particular was concerned that the Act was granting wide-ranging powers, especially over employers, to the Department of Labor. Congressman Steiger of Wisconsin, the chief House sponsor of the Act, said in urging a favorable House vote on the conference-reported bill:

> The Secretary's standard will only be sustained by the court if it is supported by "substantial evidence on the record considered as a whole." Thus, the Secretary must have a record upon which to base his findings and to serve as the basis for judicial review. The act does not provide for an independent board for standard-setting as did the House bill. However, the court

review based upon substantial evidence provides a sufficient element of fairness to satisfy me that [the] conference report should be accepted. (116 Cong. Rec. 42206 (daily ed. Dec. 17, 1970).) [16]

b. The decision below is not supported by any provision of the Act.

While recognizing that the substantial evidence test applies to OSHA determinations, the court below ruled that there is an implied exception for "policy judgments" (App. A, 9-10; 503 F.2d at 1160). The court has taken the position that the Secretary's policy judgments (and the standards based thereon) should be affirmed whenever the Secretary indicates factual certainty is not possible and identifies the controlling considerations (App. A, 6; 503 F.2d at 1158).

But the Act does not call for "factual certainty"; it calls for substantial evidence on the record as a whole—a standard of review with which the courts are familiar. Further, Section 6(e) of the Act provides that whenever the Secretary shall promulgate any standard "he shall include a statement of the reasons for such action, which shall be published in the Federal Register." This provision clearly requires OSHA to identify "the controlling considerations" and articulate the reasons for its decisions.

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[16] Congressman Steiger also made clear that the "whole" record was to include favorable as well as unfavorable evidence: "It is contemplated by the draftsmen that the Secretary will base his decision upon a record which has been contributed to by public and private organizations as well as interested individuals." 116 Cong. Rec. 42206 (daily ed. Dec. 16, 1970). Congress was thus adopting the rule of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951), that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

See Dry Color, supra, 486 F.2d at 105-06. Thus, the decision of the court below reduces to the proposition that if OSHA has issued a statement of reasons as required by Section 6(e), its "policy" judgments will be upheld even if totally unsupported by any evidence in the record. That is certainly not what Congress intended when it enacted the judicial review provision contained in Section 6(f).

There is no suggestion anywhere in the Act that OSHA determinations can be based upon less than substantial evidence. The specific provision (Section 6(b)(5)) dealing with the development of standards for toxic materials or harmful physical agents states that such standards "shall be based upon research, demonstrations, experiments, and such other information as may be appropriate." The Act itself thus expressly belies the notion that OSHA was granted authority to issue factually unsupported "policy" edicts to be given only cursory review by the courts.

Furthermore, OSHA's criterion that if carcinogenicity in two animal species is established, carcinogenicity in man may be presumed (absent countervailing evidence) can hardly be termed a "nonfactual policy decision" (see App. A, 8; 503 F.2d at 1159). It is obviously based on factual premises which may not be correct. Indeed, while not questioning the basic proposition, petitioners contend and OSHA concedes that the criterion is subject to the qualification that evidence of human experience can rebut any inference of carcinogenicity based on animal studies. Petitioners argued that viewing the evidence as a whole, OSHA's determination that EI is a human carcinogen is not supported by substantial evidence. The court below, however, did not even consider that issue because

it termed OSHA's determination a "policy decision" not subject to substantial evidence review (App. A, 8-11; 503 F.2d at 1160-61).

Finally, the decision below did not even adhere to the narrow scope of review the court believed appropriate for OSHA policy decisions. After recognizing that such review should at least include "determining whether presently available alternatives were at least considered" (App. A, 10; 503 F.2d at 1160), the court accepted OSHA's view that the agency had only two alternatives: either to regulate EI as a carcinogen or not to regulate EI at all (see Preamble to Order, App. C, 26-27). In fact, as petitioners pointed out to the court below, OSHA can and does regulate EI as a toxic chemical.[17]

c. OSHA has failed to comply with its own criterion for issuing standards.

The Preamble to the EI standard clearly adopts the NIOSH standard that a substance must be demonstrated to cause malignant tumors in at least two animal species before an extrapolation can be made to man (App. C, 25). The Preamble goes on to state:

> We think it improper to afford less protection to workers when exposed to substances found to be carcinogenic only in experimental animals. *Once the carcinogenicity of a substance has been demonstrated in animal experiments,* the practical regulatory alternatives are to consider them either non-carcinogenic or carcinogenic to humans, until evidence to the contrary is produced. The first alternative would logically require, not

[17] EI is regulated by OSHA as a toxic air contaminant pursuant to a national consensus standard (29 C.F.R. § 1910.93) promulgated under Section 6(a) of the Act.

> relaxed controls on exposure, but exclusion from regulation. The other alternative logically leads to the treatment of a substance as if it was known to be carcinogenic in man.
>
> We agree with the Director of NIOSH, and the report of the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens to the Surgeon General, U.S. Public Health Service, April 22, 1970, that the second alternative is the responsible and correct one. (App. C, 26-27 (emphasis added).)

In issuing the permanent EI standard, OSHA apparently ignored the pointed comment in *Dry Color* that it was doubtful whether EI could be considered dangerous to man under OSHA's test "since although it does 'cause tumors' in animals, there is some question as to whether it is 'definitely carcinogenic.' " 486 F.2d at 104 n.6.

The court in *Dry Color* noted that the Ad Hoc Committee Report recommended that if any substance is shown to cause tumors in animals, it should be considered carcinogenic and therefore a potential cancer hazard for man. However, the court also noted that this recommendation does not "command unanimous agreement," the Report was not part of the record, and there was no evidence that it was relied upon (*id.* at 104).

The permanent EI standard, which replaced the emergency standard the court set aside in *Dry Color*, is based upon virtually the same record as the emergency standard. While the Ad Hoc Committee Report was placed in the record and mentioned in the Preamble to the EI standard, it was only cited for the proposition that it was proper to make an extrapola-

tion from studies of animals to man (see App. C, 27). OSHA did not adopt the Ad Hoc Committee's recommendation as to what constitutes sufficient evidence to make that extrapolation.

When petitioners pointed out to the court below that the Innes test had not produced any evidence of cancer and that OSHA's own criterion had not been met, counsel for respondents argued that if any substance is shown to cause tumors in animals, it should be considered carcinogenic and therefore a potential cancer hazard for man based on the Ad Hoc Committee recommendation. The court concluded on the basis of that statement that the determination of animal carcinogenicity was supported by substantial evidence. The fact remains that OSHA did not adopt this and other Ad Hoc Committee recommendations (see App. C, 27-28). Indeed, OSHA's counsel conceded in the court below that OSHA has always relied on the more conservative (and supportable) NIOSH test which requires definite proof of malignant tumors in two species of animals before any conclusions are drawn concerning danger to man.[18]

In upholding the EI standard by reference to a criterion which OSHA had affirmatively rejected, the court below violated the well established rule that in determining whether there is substantial evidence for a particular agency decision, the reasoning of the

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[18] Brief of Respondents (Respecting Chemicals Other than EI) at 22, *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, No. 74-1129 (3d Cir. Dec. 17, 1974). This concession was pointed out to the court below by Petitioners. Petition for Rehearing at 12, 503 F.2d 1155 (3d Cir. 1974).

agency at the time the standard was issued should be examined, not *post hoc* rationalizations of counsel.[19]

2. The Novel Doctrine Espoused by the Court Below, Limiting the Scope of Review of OSHA Standards, Is in Conflict With the Decisions of Other Courts of Appeals.

A number of courts of appeals have struggled with what the court below has called the "enigmatic"[20] standard of review that Section 6(f) of the Act provides for OSHA's rulemaking actions. The reviewing courts' difficulty perhaps has arisen because "[t]he substantial evidence test has customarily been directed to adjudicatory proceedings or formal rulemaking." *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 473 (D.C. Cir. 1974).[21] In spite of this difficulty, however, only the court below has refused to apply the substantial evidence test to the totality of the Secretary's standard-setting function as mandated by the Act.[22]

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[19] *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443-44 (1965); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962); *Dry Color*, *supra*, 486 F.2d at 104 n.8, 106.

[20] This was the adjective used to describe the Act's provisions by the opinion in *Brennan* v. *Occupational Safety and Health Review Commission (Hanovia Lamp)*, 502 F.2d 946, 950 (3d Cir. 1974), which dealt specifically with review under Section 11(a) (which applies the substantial evidence test specifically to factual determinations by the Commission) and was decided by the same three-judge panel that rendered the decision in this case.

[21] See also Note, *The Judicial Role of Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 801-03 (1974).

[22] The first reported decision applying the substantial evidence test to a review of OSHA rulemaking was by a different panel of the Third Circuit in *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor*, 486 F.2d 98 (3d Cir. 1973). In addition to vacating the emergency temporary standard for EI and one

The court below appears to have developed its review standard of "consistency between the Secretary's rule and the statutory language and purpose" (App. A, 9; 503 F.2d at 1159) through an extension of the dicta in *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974). As the court below noted, Judge McGowan in that case made a distinction between decisions of the Secretary that were "susceptible of resolution on a factual record," which the Third Circuit said would then be reviewed for substantial evidence, and "those issues which by their nature were not capable of [factual] resolution but represented policy judgments" (App. A, 6; 503 F.2d at 1158). See *Industrial Union, supra*, 499 F.2d at 475-76.

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other chemical for failure to comply with Section 6(e), the court opined that "we have doubts as to whether there is substantial evidence in the record to support OSHA's finding that DCB and EI are carcinogenic in man," which was the basis of the standard. 486 F.2d at 105. Because of its doubts as to the substantiality of the evidence, the court chose not simply to remand:

> In view of our considerable doubts as to whether there is sufficient evidence in the record to support the finding that DCB and EI are carcinogenic in man, we find that the more drastic remedy of vacating the standard is appropriate. (486 F.2d at 107 n.13.)

Thus, a different Third Circuit panel in *Dry Color* did employ the substantial evidence test to review the evidence in the whole record in considering and selecting its remedy. The discussion of the substantial evidence test in *Dry Color* has been superseded, however, by the holding in the instant decision. In its opinion on the rest of the standards challenged in the petition for review that also challenged the EI standard, the Third Circuit recently stated: "Our conclusions as to the legal issues presented by the earlier case likewise apply to the appeals now under consideration and we need not repeat what was said in our prior opinion." *Synthetic Organic Chemical Manufacturers Association* v. *Brennan*, No. 74-1129 (3d Cir. Dec. 17, 1974) (slip opinion at 3).

Although the court in *Industrial Union* stated it was examining the Secretary's standard-setting function in terms of its consistency with the requirements of the Act, it still conducted the necessary searching examination of the evidence supporting those decisions, whether denominated policy decisions or factual findings.[23] After concluding a lengthy examination of the record on the disputed issues (see *id.* at 478-88), Judge McGowan stated:

> All of the challenged features of the standards appear to partake of an essentially legislative type of decision making by the Secretary in the performance of the broad delegation made to him by Congress.
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> * * *
>
> What, in our view, differentiates the two provisions we have remanded from those we have left untouched is that the record, examined closely in relation to the relevant concerns of the Act, leaves nagging questions — even for the inexpert observer — as to the reason and rationale for the Secretary's particular choices. However the statutory standard for our review may be characterized, we consider that our dispositions fall within it. (*Id.* at 488.)

The court below has gone far beyond the reasoning of Judge McGowan and completely abdicated its responsibility to make a careful review of the rationale and underlying basis for the Secretary's decisions. This approach is not supported by what the court did (as opposed to what it said) in *Industrial Union,* and it is in clear conflict with the approach taken by every

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[23] *Cf. Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

other circuit which has considered the issue.[24] Given the large number of OSHA cases now pending and which can reasonably be anticipated will be brought in the future in the courts of appeals,[25] the resolution of this conflict in the circuits is of vital importance.

In *Associated Industries of New York State, Inc.* v. *Department of Labor,* 487 F.2d 342 (2d Cir. 1973), the court vacated and remanded an OSHA standard respecting lavatories for industrial establishments. Judge Friendly, in his opinion for the court, recognized that Congress had made its own policy choice in requiring courts to review OSHA regulatory decisions using a substantial evidence test. The court said that while it would not have chosen that test itself, it would respect Congress' choice and apply the more rigorous standard to policy as well as factual determinations by OSHA. In rejecting OSHA's argument for a lesser standard of review, Judge Friendly stated:

> . . . [T]here can be no question that the "determinations" to which § 655(f) [§ 6(f)] applies the substantial evidence test, whatever precisely that may mean in the context, *include the overall policy*

[24] Section 6(f) has also been reviewed by courts of appeals in the Second, Fifth and Seventh Circuits. *National Roofing Contractors Association* v. *Brennan,* 495 F.2d 1294 (7th Cir. 1974), *petition for cert. pending,* 43 U.S.L.W. 3148 (U.S., filed Sept. 13, 1974); *Florida Peach Growers Association, Inc.* v. *Department of Labor,* 489 F.2d 120 (5th Cir. 1974); *Associated Industries of New York State, Inc.* v. *Department of Labor,* 487 F.2d 342 (2d Cir. 1973). Section 6(f) was also reviewed previously by the Third Circuit, although the decision turned on the application of Section 6(e). See note 22, p. 23, *supra.*

[25] OSHA has announced plans to set standards for 386 chemicals in 23 chemical groups, with regulations similar to those at issue here, over the next two years. 4 OCCUP. SAFETY & HEALTH REP. 732, 752-59 (Nov. 21, 1974).

> *decision to promulgate a rule. The word "determinations" is used throughout § 655 to include policy choices as well as factual findings, and particularly to include promulgating of standards.* (*Id.* at 348 (emphasis added).)

On the facts of the case before the Second Circuit, Judge Friendly found that there was not evidence in the record as a whole to justify the choice the Secretary made (*id.* at 351-52). There was evidence in the record supporting the numerical standard the Secretary chose, but no evidence justifying the choice of that numerical standard over other standards that had been proposed. It was this policy decision that the Second Circuit required substantial evidence to support.[26] Further, Judge Friendly noted specifically that the choice Congress made in requiring the substantial evidence test for review of OSHA proceedings precluded the normal deference paid to administrative policy decisions: "[I]t is plain that this [deference] was not the policy choice that Congress made in enacting OSHA and many other regulatory statutes of the last decade." *Id.* at 354.

The Fifth Circuit followed the Second Circuit's *Associated Industries* decision when, in *Florida*

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[26] Noting that the Secretary had chosen the highest standard required by a minority of States as his standard, Judge Friendly commented on this point:

> . . . [W]hen the Department imposes a standard considerably more stringent than that which apparently has been found satisfactory by many states with a long history of protection to industrial workers, and particularly when it does so over explicit objections grounded on that history, it has an obligation to produce some evidence justifying its action. (487 F.2d at 353.)

Peach Growers Association, Inc. v. *Department of Labor,* 489 F.2d 120 (5th Cir. 1974), it vacated and remanded an OSHA standard pertaining to reentry requirements for fields and orchards treated with organophosphorous pesticides. After reviewing the legislative history, the Fifth Circuit joined with the Second Circuit in rejecting OSHA's argument for a less stringent review than the substantial evidence test would require. The court held:

> Thus it seems clear that even with the required substantial evidence test, our review basically must determine whether the Secretary carried out his essentially legislative task in a manner reasonable under the state of the record before him. (*Id.* at 129.)

The Fifth Circuit concluded, after an examination of the entire record, that there was not substantial evidence to support the Secretary's decision to issue an emergency standard. Addressing the evidence adverse to that decision, the court noted that "[t]here is an abundance of evidence that emergency standards are not necessary." (*Id.*) Despite the fact that the decision at issue—whether to issue a standard—was legislative in nature, the Fifth Circuit still required substantial evidence to support it.

In *National Roofing Contractors Association* v. *Brennan,* 495 F.2d 1294 (7th Cir. 1974), *petition for cert. pending,* 43 U.S.L.W. 3148 (U.S., filed Sept. 13, 1974), both the court's majority and the dissenter said they were applying the substantial evidence test without any judicially engrafted limitation. *Id.* at 1297 & n. 9, 1301 & n. 2. While the majority and minority disagreed sharply over the substantiality of

the evidence to support the standard at issue, neither found or imposed any limitations on the substantial evidence test for review.

In the present case, the decision of the court below adopts a strained and uniquely limited view of what the substantial evidence test entails to avoid making a meaningful analysis of the record. The decision sharply separates review of "factual matters subject to evidentiary development" from all other disputed points (App. A, 10; 503 F.2d at 1160) and takes a very narrow view of what falls in the former category. With respect to other disputed points, the court limited its task to determining whether OSHA had indicated "awareness" of the correct statutory goals and alternative courses of action. However, it is clear that Congress intended the court's review of such disputed matters to be no less exacting, searching or careful than its review of strictly factual matters.

CONCLUSION

The decision of the court below raises the basic question whether OSHA standards are to receive merely perfunctory review in the courts of appeals or the "hard look" which Congress intended. The court's decision permits OSHA to disregard evidence in the record favorable to petitioners, and it upheld the EI standard even though the record contains inadequate evidentiary support to meet the criterion which OSHA prescribed for itself. This approach to judicial review contrasts sharply with the careful review given OSHA standards by the Second, Fifth and Seventh Circuits. The importance of this issue and its conflicting resolution in the courts of appeals

make it highly appropriate for this court to grant certiorari.

Respectfully submitted,

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